IN THE

Supreme Court of the United States

October Term, 1967

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No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACH, SAND LAKE AND NORTH GREENBUSH, RENSSELAER COUNTY AND CHATHAM, COLUMBIA COUNTY AND BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD AND OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

v.

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Intervenor-Appellees.

Appeal from the Court of Appeals of the State of New York

BRIEF OF AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, CENTRAL CONFERENCE OF AMERICAN RABBIS, JEWISH LABOR COMMITTEE, JEWISH WAR VETERANS OF THE U. S. A., NATIONAL COUNCIL OF JEWISH WOMEN, UNION OF AMERICAN HEBREW CONGREGATIONS AND UNITED SYNAGOGUE OF AMERICA, *AMICI CURIAE*

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Appeal from the Court of Appeals of the State of New York

AMICUS CURIAE BRIEF

Interest of the *Amici*

This brief is submitted with the consent of counsel for the parties, in behalf of the following national Jewish organizations:

American Jewish Committee
American Jewish Congress

Anti-Defamation League of B'nai B'rith
Central Conference of American Rabbis
Jewish Labor Committee
Jewish War Veterans of the U.S.A.
National Council of Jewish Women
Union of American Hebrew Congregations
United Synagogue of America

Each of these organizations is concerned with preservation of the security and constitutional rights of Jews in America through preservation of the security and constitutional rights of all Americans. They are committed to the belief that separation of church and state is the surest guarantee of religious liberty and has proved of inestimable value both to religion and to the community generally. They submit this brief because they believe that the program provided for in the statute under review is a form of aid to religious institutions, bringing in its train the evils that the constitutional guarantee of separation of church and state was designed to prevent.

Statement of the Case

This is a suit by the boards of education of two school districts in New York challenging the constitutionality of a statute enacted by the state legislature in 1965 and amended in 1966 providing for state financing of the purchase of textbooks to be used without charge in private schools. The statute (Laws of 1965, ch. 320; Education Law, §701.3; 16 McKinney's Consol. Laws of New York) provides as follows:

> In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the

> power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees, or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities.

The purpose of the law is set forth in its first section, which reads as follows:

> * * * It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense, and the general welfare of the state. (Laws of 1965, ch. 320, §1.)

Although the statute speaks only of "private" schools, and does not specifically either include or exclude sectarian, parochial or other religiously affiliated or controlled schools, the New York Court of Appeals interpreted the statute (as did the lower courts) to include schools which, in the language of the state constitution (Article XI, Section 3), are "wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught."

On January 10, 1966, the State Department of Education, whose executive head is the appellee in this appeal,

acting pursuant to the statute, issued instructions to all school districts for the effectuation of the purposes and provisions of the statute. For the convenience of this Court, the text of these instructions is set forth as an appendix to this brief (*infra*, pp. 43-48).

The statute and the instructions imposed upon the various school boards of the state an affirmative duty which the appellants herein believed was violative of both the State and Federal constitutions. Accordingly, they brought suit in the Supreme Court of the State of New York, Albany County, and succeeded in obtaining a decision upholding their contentions (A. 29a-42a).* The Appellate Division of the Supreme Court reversed the decision (A. 43a-60a) and the Court of Appeals, by a vote of four to three, affirmed the judgment of the Appellate Division and upheld the constitutionality of the statute under both the State and Federal constitutions[1] (A. 61a-76a).

The Question to Which This Brief Is Addressed

This brief is addressed to the single question whether public financing of the purchase of secular textbooks for use in sectarian or parochial schools violates the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution. It expresses no opinion on the constitutionality of the law as applied to nonsectarian or secular private schools.

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* Numbers in parentheses preceded by the letter "A." refer to pages of the Appendix.

1. The opinion of the Supreme Court is reported at 51 Misc. 2d 297, 273 N.Y.S. 2d 239; that of the Appellate Division at 27 A.D. 2d 69, 276 N.Y.S. 2d 234; the Court of Appeals opinion is reported at 20 N.Y. 2d 109, 281 N.Y.S. 2d 799, 228 N.E. 2d 791.

Summary of Argument

This appeal presents a case of state financing of an aspect of parochial school education. Legislative designation of the provision of textbooks as "loans" to the children rather than "gifts" to the schools does not avoid the prohibitions of the First Amendment. It is a fiction to designate the provision as one for "loans" and, even if it were not, free loans of public property to churches is as unconstitutional as gifts of the property. Similarly, it is equally a fiction to characterize the children rather than the schools as the beneficiaries of the statutory program. The "child benefit" theory, which rests on that fiction, finds no support in the Constitution or the decisions of this Court. Acceptance of the concept to sustain the New York program providing textbooks for use in parochial schools could lead to constitutional justification of public financing of all costs of parochial and sectarian schooling with the possible exception of costs of direct teaching of religious dogma and practice. *Cochran* v. *Louisiana State Board of Education,* 281 U. S. 370 (1930) does not support the constitutionality of the New York law since it neither considered nor passed upon the applicability of the First Amendment to the textbook law there in issue.

The definitive interpretation of the Establishment Clause in *Everson* v. *Board of Education,* 330 U. S. 1 (1947) often repeated and applied by this Court in later cases, requires a determination that New York's textbook law seeks unconstitutionally to aid religion. Nothing in *Abington School District* v. *Schempp,* 374 U. S. 203 (1963) indicates any intention to retreat from or modify the definitive in-

terpretation set forth in *Everson* nor otherwise requires or even supports a determination other than that the law here in issue is unconstitutional as a law respecting an establishment of religion.

The textbook law is unconstitutional also under the free exercise clause of the First Amendment because it effects a compulsory tax for religious purposes. This conclusion is not altered by the fact that the funds used to purchase the books come from the general public treasury rather than a tax specifically designated or imposed for that purpose.

ARGUMENT

POINT I

The New York statute provides for State financing of parochial schools.

A. The Fiction of Loans

The New York statute uses the word "loan" rather than "give" or "donate", but the statute comes to this Court with the gloss of the New York Court of Appeals' opinion and the Education Department's letter of instruction. These, together with facts of common knowledge, indicate quite clearly that in the present case the claim that only a loan is involved is entirely fictional.

A loan of a book implies a short time use and a return. This type of transaction occurs thousands of times daily in public libraries all over the nation, where books are generally loaned for two or four weeks' use and are then re-

turned, so that they may be available for similar loans to other borrowers. This is quite clearly not what is contemplated by the New York statute, the Court of Appeals and the State Education Department.

A number of facts require this conclusion. In the first place, the statute is limited to textbooks. Such books are not intended for use for two or four weeks but for an entire school year. Paragraph 12 of the Education Department's letter of instruction (*infra*, p. 47) speaks of a yearly turnover of the books from one class to the next within each school. It is because of their long-term use that, as is commonly known, textbooks are generally not available in public libraries.[2]

In the second place, a loan necessarily implies return to the lender, but nothing in the statute or the letter of instruction requires return to the lender (the public school authorities) of the "loaned" textbooks. Indeed, the letter fairly contemplates that they will not be returned. We have seen that Paragraph 12 specifically negates the return of the books even at the end of the year. Paragraph 8 (*infra* pp. 45-6) states that "It is expected that public and private school authorities will make it possible to use requested textbooks over a period of years rather than requesting new textbooks on an annual basis." Any elementary school teacher or even parent of a school child knows that textbooks last for but a short "period of years" and then must be discarded either because they have become outdated or because they are physically no longer usable. The transac-

2. The fictional nature of the analogy to libraries is also revealed by the fact that the statute restricts the "loans" to secular books. Libraries are not so limited.

tion is reminiscent of the reply of Coriolanus to his friend Lartius whose horse he had just won in a friendly wager:

> No, I'll nor sell nor give him: lend you him I will
> For half a hundred years. (Act 1, Sc. 4)

In the third place, library loaning, at least, implies universality of availability. Any child, whether he attends a public or private school or no school at all may enter the public library and borrow a book. But the textbooks provided for by the statute are available only to specified groups, children enrolled in grades 7 to 12 of a school which complies with the compulsory education law.[3] Moreover, a child enrolled in the public schools cannot, either under the statute or the letter of instructions, enter a parochial school and borrow a book whose purchase was financed by public funds under the statute but is not one which is used in the public school he attends, although he could, of course, do so if the book were in a public library.

Finally, the statute and the letter of instruction clearly indicate an intent that the use of textbooks in the nonpublic schools shall be in a manner exactly the same as in the public schools. Until it was found necessary to find a constitutional justification for the free provision of publicly owned books in sectarian schools, no one suggested that school boards "loaned" books to the public schools in which they were used, any more than they "loaned" desks, chairs, blackboards and chalk. There would be little left of the

3. The Court of Appeals was therefore in error when it stated that "Subdivision 3 of section 701 of the Education Law asks no questions about what school the child attends, thus avoiding even the objection raised by Mr. Justice Jackson in his *Everson* dissent" (A. 67a, n. 2).

First Amendment's barrier to public financing of sectarian schools if it could be evaded simply by designating the permanent and exclusive free use of specific public property as a loan rather than as a gift.

It is true that the letter of instruction suggests that each book be stamped with the legend "This Book is the Property of the Blank C.S. District" (*infra*, p. 45). But is the First Amendment so frail that it can be overcome by a rubber stamp?

At most, the effect of the legend is to declare the state's legal reservation of title to the books. But legal title is not the constitutional criterion. In *Quick Bear* v. *Leupp*, 210 U. S. 50 (1908), the Court upheld the expenditure for sectarian school support of Indians' treaty funds because, while legal title was in the Federal Government, the Indian tribes had beneficial ownership. Conversely, here the transactions required by the New York law are unconstitutional because, while legal title may be in the State, beneficial ownership is in the sectarian schools.

B. The Irrelevance of the Loan Concept

Even if New York's claim of retained ownership is taken at face value, the constitutional barrier remains. The right to the use of property is itself property no less than its ownership. The New York constitutional provision (Article XI, Section 3) which the Court of Appeals, overruling a 30-year-old precedent (*Judd* v. *Board of Education*, 278 N.Y. 200 (1938)), held not violated by the textbook law, speaks exclusively in terms of use rather than

transfer of title or conveyance.[4] President Madison vetoed a bill to convey government-owned property to the Baptist Church because it violated the amendment which he had drafted, saying:

> because the bill in reserving a certain parcel of land of the United States for the use of said Baptist Church comprises a principle and a precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that "Congress shall make no law respecting a religious establishment."[5]

In *McCollum* v. *Board of Education*, 333 U. S. 203 (1948), this Court held unconstitutional a program of released time for religious education which involved the use of public school premises for religious instruction. It made no difference that no transfer of title was involved

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4. Article XI, Section 3 reads as follows: "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning." It is relevant to note that the last clause, permitting transportation, was added to abrogate the holding in *Judd* that transportation to parochial schools at public expense violated the constitutional provision. Although the Appellate Division, in a decision (*Smith* v. *Donahue*, 202 App. Div. 656 (1922)) quoted with approval in *Judd* had held that a law similar to the one here in issue likewise violated the state constitutional provision, the constitutional amendment was limited to transportation, an implicit acknowledgment that public purchase of books used in sectarian schools violates that principle of church-state separation which is the common basis of Article XI, Section 3 of the New York Constitution and the First Amendment of the United States Constitution.

5. 1 Richardson, *Messages and Papers of the Presidents* 490 (1900).

and the "loan" of the public school premises was temporary and for short periods—but one hour weekly.

As we will indicate later (*infra*, pp. 22-25), *Cochran* v. *Louisiana State Board of Education, supra*, is not determinative of the central issue in this case. One aspect of it is, however, pertinent and persuasive here, and that is this Court's recognition that there is no constitutional difference between grant of title and grant of use. There, in upholding a textbook-loan law, the Court said (281 U. S. at 375):

> The [Louisiana] Court also stated, *although the point is not of importance in relation to the Federal question,* that it was "only the use of the books that is granted to the children, or, in other words, the books are lent to them." (Emphasis supplied.)

Judge Van Voorhis, in his dissenting opinion in the court below, pointed out the insubstantiality of any constitutional distinction predicated on the claim that the books were not given but loaned (A. 73a):

> If the books to be purchased by Boards of Education and supplied to pupils of parochial schools were religious tracts, it is conceded that the statute would be unconstitutional. The mere circumstance that they would be loaned to the pupil rather than supplied directly to the school would not preserve its validity.

C. The Fiction That the Loans Are to Children

The majority of the New York Court of Appeals upheld the constitutionality of the textbook law on the ground that books are "loaned" not to the schools but to the children, that "there is no intention to assist parochial schools as such, [and that] any benefit accruing to those schools is a

collateral effect of the statute. * * *" (A. 66a). The Court thus invoked and relied upon what has become known as the "child benefit" or "indirect aid" theory.[6] We submit that this is an unrealistic description of the purpose and effect of the statute for the following reasons:

1. The declared purpose of the statute is not to aid children but to "give assistance to educational programs" (L. 1965, ch. 320 §1). The majority opinion in the court below speaks of "Federal and State aid to education" (A. 66a). It is quite clear that the majority viewed the statute as an instance of governmental aid to education. All other instances of governmental "assistance to educational programs"[7] or "aid to education" are characterized by governmental financing of the institution conducting the education programs or providing the education. Nothing in the statute or in the Court of Appeals decision indicates that the purpose and effect of this statute were to be different—except for such ritualistic obeisance to "child benefit" which might possibly serve to protect it from invalidation under the First Amendment.

2. The 1965 statute did not introduce a new program regarding textbooks into the New York educational system.

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6. The majority used the word "collateral" rather than "indirect" and indeed denied that any indirect benefit accrued to the parochial schools. The court probably so held because the New York constitution (Article XI, Section 3) forbids indirect benefits no less than direct ones. However, insofar as the First Amendment to the Federal Constitution is concerned, the assumption, which as we show below (pp. 16-22) is erroneous, is often made that indirect benefits to parochial schools are constitutionally permissible.

7. Contracts with educational institutions to perform a specific research project may be an exception, but they are obviously not contemplated by the statute here in issue.

For years public educatio al authorities have been supplying textbooks for use in public schools. They have done so under Section 703 of the Education Law, subdivision 1 whereof read, prior to 1965, as follows:

> 1. The qualified voters of any school district present at any annual school meeting or at any special school meeting duly and legally called for that purpose, shall have power, by a majority vote, to be ascertained by taking and recording the ayes and noes, to vote a tax for the purchase of all textbooks used, or to be used, in the schools of the district.

What the 1965 law did was simply to make mandatory (in grades 7 through 12) what, although theoretically merely permissive, had been in actual practice universal—the supplying of textbooks at public expense for use in public schools—and to extend it to private schools. Whatever may have been the practice in the early days of public education, it is the universal practice today that children in public schools are given the use of textbooks in the same way they receive the use of chairs, desks, blackboards, chalk, paper and all the other physical accoutrements of schooling. Provision of these facilities for public schools has never been considered an "aid to children" as distinguished from a financing of the operations of the school. Realistically, today, neither are textbooks. Should this Court hold that state financing of the purchase of textbooks for use in sectarian schools is a constitutionally permissible aid to the children and not a forbidden form of assistance to the schools, how could this be distinguished constitutionally from state financing of the purchase of chairs, desks, blackboards, and, indeed, entire buildings and all other facilities not directly related to religious instruction or practices? What then would remain of the First Amendment?

Irrespective of past practices, the statute here in issue encompasses public and parochial schools in a single program of textbook financing as far as the future is concerned. It expressly equates public and parochial schools in respect to textbook financing. Realistically what New York is saying is that it has been and will continue financing all aspects of public school education, and now it will also finance at least that portion of parochial school education arising out of the need for textbooks.

3. Eligibility for participation in the textbook program is dependent not upon the child but upon the school. Unlike the public library pattern, only those children are entitled to the benefits of the law who are enrolled in "a public or private school which complies with the compulsory education law." But if the child is the intended beneficiary of the law, why should he be penalized because the school he attends does not meet the standards of the education law? The point was well stated by the Circuit Court in the Oregon case of *Dickman* v. *School District*, 232 Ore. 238, 366 P. 2d 533 (1961):[8]

> * * * If the books are furnished to the children alone and not the school, why then does the school have to meet certain governmental standards before the children who attend them are entitled to free books? Is not a child attending a poorly operated school in need of free books as much, if not more so, than one attending a school that is well run? Are the children of poor sects in any less need of free textbooks because their church cannot afford concrete fireproof buildings? The

8. The Circuit Court was of the opinion that Oregon's parochial school textbook law was unconstitutional but believed itself bound by this Court's decisions in *Cochran* and *Everson*. The Oregon Supreme Court held that these decisions did not require such a holding and adjudged the law to be unconstitutional, substantially for the reasons stated by the Circuit Court.

standards of the schools, not the needs of the children, determine their eligibility. (Abstract of Record, 23-24).

4. The school is inextricably involved in the administration of the law, so much so that the law cannot operate without the full and active participation of the school (unlike public libraries which are completely independent of schools). This can be seen from the following:

(a) Eligibility for books is dependent upon enrollment in specified grades in the school. (Statute)

(b) The school must be one which complies with the compulsory education law. (Statute)

(c) Only textbooks are available. (Statute)

(d) The books must be those approved for use in public schools. (Statute)

(e) The regulations for distribution of the books must be prescribed by "school authorities" (not public library authorities). (Statute)

(f) Students attending schools outside the state are not eligible. (Letter of Instruction, par. 2)

(g) While technically the "requests to the board for the loan of textbooks must come from the individual child, * * * children may make their requests known to an official in a private school and such private school official may then provide the board with a joint request from a number of such children." (Letter of Instruction, par. 5.) It may safely be presumed that the latter is the usual if not universal practice. (In public libraries, the library deals exclusively with the borrowing child.)

(h) The "board need only provide such textbooks as are needed in the school" (Letter of Instruction, par. 8).

(i) "It is assumed that the public school, working in conjunction with the private schools, can decide on those books which are generally accepted as textbooks" (Letter of Instruction, par. 9).

(j) The books are received by the children from the private school at the beginning of the year and returned to the private school at the end of the year. This is clearly inferrable from Paragraph 12 of the letter of instruction, which provides that the books need not be returned to the public school at the end of the year. Hence, the only way a book can be available for use by another child in the second year is by having the first child return it to the private school from which the second child can receive it the following year. It can scarcely be assumed that each seventh grade child can be expected personally to turn over the books to his successor in interest.

D. The "Child Benefit" Theory

Even if full faith and credit is accorded to the legislative assertion that the purpose and effect of the textbook law is to loan books to children attending private and parochial schools rather than to aid the schools they attend, the law, we submit, would still be violative of the First Amendment. The reliance of the New York Court of Appeals on the "child benefit" or "indirect aid" theory was, we suggest, erroneous. The "child benefit" theory has no support in the Constitution or in the decisions of this Court. The test

this Court has applied is not whether the aid provided through sectarian schools is intended for the child but whether it is educational or noneducational.[9]

The "child benefit" theory appears to have been first advanced in 1922 by counsel in the textbook case of *Smith* v. *Donahue, supra.* It was there rejected in language which is as valid today as it was then (202 App. Div. at 661):

> Even though we accept the statute as meaning that the books and supplies are to be furnished to the pupils and not to the schools, we think the act plainly comes within the prohibition of the Constitution; if not directly in aid of the parochial schools, it certainly is in indirect aid. The scholars do not use textbooks and ordinary school supplies apart from their studies in the school. They want them for the sole purpose of their work there. There is no question but that the textbooks and ordinary school supplies are furnished direct to the public schools; there is no thought that they are furnished to the scholars as distinct from the schools. Neither can there be such a thought in the case of parochial schools.

Later in the opinion the court said (*id.* at 663-664):

> * * * [T]he school is not the building and its equipment; it is the organization, the union of all the elements in the organization, to furnish education in some branch of learning * * * * It is the institution, and the teachers and scholars together, that make it up. The pupils are part of the schools.
>
> * * *
>
> It seems to us to be giving a strained and unusual meaning to words if we hold that the books and the ordinary school supplies, when furnished for the use

9. It is, of course, not here contended that the State may not constitutionally provide for the welfare of children. Indeed, it has a duty to protect their health and welfare.

> of pupils, is a furnishing to the pupils and not a furnishing in aid or maintenance of a school of learning. It seems very plain that such furnishing is at least indirectly in aid of the institution and that, if not in actual violation of the words, it is in violation of the true intent and meaning of the Constitution and in consequence equally unconstitutional.

In *Gurney* v. *Ferguson,* 190 Okla. 254, 122 P. 2d 1002 (1941), a school bus case, the court similarly refused to accept the "child benefit" theory. The court said (190 Okla. at 255):

> It is urged that the present legislative act does not result in the use of public funds for the benefit or support of this sectarian institution or school as such; that such benefit as flows from these acts accrues to the benefit of the individual child or to a group of children as distinguished from the school as an organization. That argument is not impressive. A similar argument was said to be "utterly without substance" in *Judd* v. *Board of Education,* 278 N.Y. 200, 15 N.E. 2d 576. It is true this use of public money and property aids the child, but it is no less true that practically every proper expenditure for school purposes aids the child * * * The state has no authority to maintain a sectarian school. Surely the expenditure of public funds for the erection of school buildings, the purchasing and equipping and upkeep of same; the payment of teachers, and for other proper related purposes is expenditure made for schools as such. Yet the same argument is equally applicable to those expenditures as to the present one.
>
> If the cost of the school bus and the maintenance and operation thereof was not in aid of the public schools, then expenditures therefor out of the school funds would be unauthorized and illegal * * * If the maintenance and operation of the bus and transportation of pupils is in aid of the public schools then it

would seem necessary to follow that when pupils of parochial schools are transported such service would likewise be in aid of that school.

The expenditure of the public funds for the purposes here shown is confined to children attending school, thus refuting any argument that such transportation is for the benefit of children generally and not for schools or that such transportation is furnished in regulating traffic within the police power, or primarily in promoting the health and safety of the children of the state.

The "child benefit" theory was first adopted by a court in *Borden* v. *Louisiana State Board of Education,* 168 La. 1005, 123 So. 655 (1929), a textbook case, and since then has, with only one exception,[10] been rejected by the courts to which it has been presented.[11] Although this Court in

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10. *Chance* v. *Mississippi State Textbook Board,* 190 Miss. 453, 200 So. 706 (1941).

11. *Textbooks*: *Zellers* v. *Huff,* 55 N.M. 501, 236 P.2d 949 (1951); *Dickman* v. *School District,* 232 Ore. 238, 366 P. 2d 533, cert. den., 371 U. S. 823 (1962); *Haas* v. *Independent School District,* 69 S.D. 303, 9 N.W. 2d 707 (1943).

Bus Transportation: *Matthews* v. *Quinton,* 362 P. 2d 932 (Alaska, 1961); *State ex rel. Traub* v. *Brown,* 36 Del. 181. 172 A. 835 (1934); *Opinion of the Justices,* 216 A. 2d 698 (Del., 1962); *Silver Lake Consolidated School District* v. *Parker,* 238 Iowa 984, 29 N.W. 2d 214 (1947); *McVey* v. *Hawkins,* 258 S.W. 2d 927 (Mo., 1953); *Judd* v. *Board of Education, supra*; *Gurney* v. *Ferguson, supra*; *Board of Education* v. *Antone,* 384 P. 2d 911 (Okla., 1963); *Mitchell* v. *Consolidated School District,* 17 Wash. 2d 61, 135 P. 2d 79 (1943); *Visser* v. *Nooksack Valley School District,* 33 Wash. 2d 699, 207 P. 2d 198 (1949); *State ex rel. Van Straten* v. *Milquet,* 180 Wisc. 109 292 N.W. 392 (1923); *Reynolds* v. *Nussbaum,* 17 Wisc. 2d 148, 115 N.W. 2d 761 (1962).

Direct Subsidy: *Opinion of the Justices,* —— N.H. ——, decided October 6, 1967.

Tuition Payments: *Almond* v. *Day,* 197 Va. 419 (1955); *Swart* v. *South Burlington School Dist.,* 122 Vt. 177, cert. den. 366 U. S. 925 (1961).

Construction of College Buildings: *Horace Mann League* v. *Board of Public Works,* 242 Md. 645, 220 A. 2d 51, cert. den. and appeal dismissed, 385 U. S. 97 (1966).

Cochran accepted the Louisiana court's interpretation of its statute, it did not in *Everson* v. *Board of Education,* 330 U. S. 1 (1947), adopt the "child benefit" theory. Publicly-financed transportation was not there sustained in reliance on the *Cochran* decision. Had the Court wished to adopt the "child benefit" theory, it could have relied on *Cochran,* but that decision was not even cited in the church-state part of the opinion and only tangentially in the taxation-for-private-purpose part (330 U. S. at 7).

It was not the fact that the benefit to parochial schools was indirect that preserved the constitutionality of the statute in *Everson;* it was that the service supplied was of a welfare rather than an educational character. The purpose of the statute, according to the Court's opinion, was not to further education but to protect children from the hazards of traffic. In this case, children were the object of the welfare service in the same way that they are the recipients of medical and dental services or hot lunches. The distinction made in *Everson* was analyzed in a note appearing in the Winter 1966 issue of the Indiana Law Journal (41 Indiana Law Journal 302, 309-10):

> The nature of the benefit must be the point of focus instead of the beneficiaries. Benefits coming within the category of educational costs are unconstitutional. But *Everson* would sustain the public giving of what has been referred to as "true welfare" benefits such as vaccinations, medical treatment, dental care, school lunches, and health programs. The kind of benefit is determinative, and attendance at a given school is constitutionally insignificant * * *

We will return to *Cochran* to show further why it is not a precedent applicable in this case; here we note only that

those state courts which have upheld transportation statutes have done so on the welfare service rather than "child benefit" premise.[12]

It is true that the statute, as construed by the Court of Appeals, authorizes only nonreligious or secular textbooks for use in parochial schools, but we submit that the secularity of the textbooks is irrelevant if the aid is educational. The test is not the nature of the aid or benefit, but whether in fact an educational aid or benefit of any kind has been conferred. Textbooks are not the only "secular" articles used in parochial schools. There is nothing particularly sectarian about chairs, desks, notebooks, chalk, board erasers, pencils, pens, electrical fixtures, heating equipment and a hundred other objects without which a school, public or parochial, cannot operate. Can it be urged that under the First Amendment public authorities could validly purchase these objects and divide them among public and religious schools? Can it be urged that if they did so they would not be providing "aid" or "benefit" to the parochial schools?

The crux of the matter is that if the "child benefit" theory is accepted in this case, it can lead only to constitutional justification of public financing of all costs of sectarian schooling other than the cost of missals and prayer books and compensation for that portion of the teachers' time as is devoted to religious indoctrination or ritual. It is significant that, in the first case in which the "child benefit" theory was presented to a court, *Smith* v. *Donahue*,

12. See, e.g., *Rhoades* v. *School District*, 424 Pa. 202, 226 A. 2d 53 (1967).

supra, the challenged statute was not limited to textbooks but included other school supplies. The court, seeing no difference between financing of textbook purchases and of other school supplies, rejected the "child benefit" theory in respect to both. We suggest that if this Court does otherwise, the result will be virtually full financing of religious school operations out of tax-raised funds.

POINT II

Cochran v. *Louisiana State Board of Education* is no precedent for the constitutionality of the New York textbook law.

In *Cochran*, this Court upheld the constitutionality of a Louisiana law similar to the one here in issue. The only ground on which the law was challenged and on which the Court passed was whether Louisiana was using public funds for a private purpose, thus constituting a deprivation of property without due process of law, as held in *Loan Association* v. *Topeka*, 20 Wall. 655 (1875). No claim was made that the law constituted a violation of either the establishment or free exercise provisions of the First Amendment. It was not until four years later, in *Hamilton* v. *Regents of the University of California*, that it was first suggested that these clauses may be applicable to the states.[13]

In the absence of any controlling prohibition of governmental aid to religion, it was by no means unreasonable to hold that a grant of public funds to a private school did not

13. "* * * The First Amendment, if read into the Fourteenth, makes invalid any state law 'respecting an establishment of religion, or prohibiting the free exercise thereof.'" 293 U. S. 245, 266 (1934) (concurring opinion of Mr. Justice Cardozo).

constitute an expenditure for a nonpublic purpose. Ever since Hamilton's Report on Manufactures, America has taken a broad view of what constitutes a public purpose within government's spending powers. This tradition and its inapplicability to expenditures within the purview of the Establishment Clause was well stated by Mr. Justice Jackson in his dissent in *Everson* (330 U.S. at 26):

> * * * I agree that this Court has left, and always should leave to each state, great latitude in deciding for itself, in the light of its own conditions, what shall be public purposes in its scheme of things. It may socialize utilities and economic enterprises and make taxpayers' business of what conventionally had been private business. It may make public business of individual welfare, health, education, entertainment and security. *But it cannot make public business of religious worship or instruction, or of attendance at religious institutions of any character.* (Emphasis supplied.)

In his concurring opinion in *Abington School District v. Schempp,* 374 U.S. 203, 248 (1963), Mr. Justice Brennan noted the inapplicability of *Cochran* to a challenge under the First Amendment:

> A third case in this group is Cochran v. Louisiana State Board, 281 U.S. 370, which involved a challenge to a state statute providing public funds to support a loan of free textbooks to pupils in both public and private schools. The constitutional issues in this Court extended no further than the claim that this program amounted to a taking of private property for nonpublic use. The Court rejected the claim on the ground that no private use of property was involved; "* * * we cannot doubt that the taxing power of the State is exerted for a public purpose." 281 U.S. at 375. The

case therefore raised no issue under the First Amendment.

We think it significant that in the present case the New York Court of Appeals did not cite the *Cochran* case in support of its holding that the textbook law does not violate the First Amendment. Implicitly this omission, we suggest, supports our assertion that *Cochran* constitutes neither binding nor persuasive precedent in the determination of the issues presented in this case.

Basically, the difference between *Cochran* and the present case is the difference between general or welfare legislation and legislation affecting First Amendment rights. In the case of legislation regulating rights secured by the First Amendment, the usual presumption of the constitutionality of legislation is balanced by "the preferred place given in our scheme to the great freedoms secured by the First Amendment." *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945); *Marsh* v. *Alabama*, 326 U.S. 501, 509 (1946); *Prince* v. *Massachusetts*, 321 U.S. 158, 164 (1944). Ordinarily, if a situation exists requiring legislative action, it is for the legislature and not the courts to determine the appropriateness of a proposed remedy, and the courts may not interfere unless the legislature's act was patently unreasonable. But for legislation abridging a liberty secured by the First Amendment, a more rigorous test is imposed. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945). "Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an

inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Thornhill* v. *Alabama*, 310 U.S. 88, 95-96 (1940).

It is therefore by the standards applicable to challenges under the First Amendment that this case, unlike *Cochran*, must be judged by the Court.

POINT III

The decisions of this Court consistently forbid governmental aid to sectarian schools in the form of textbooks or otherwise.

In their briefs in the Court of Appeals, both sets of appellees[14] rely heavily on the following extract from *Schempp* (374 U.S. at 222):

> The test may be stated as follows: What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Applying this test, the appellees asserted that since the textbooks furnished by the state for use in parochial schools are secular and will not be used for religious instruction, neither the primary purpose nor the effect of the state expenditures is to advance religion.

14. Defendant's brief, pp. 33-34; Intervenors' brief, p. 42.

We submit that this is erroneous on two counts. First, it misconceives the test as established by a consistent line of this Court's decisions which were in no way weakened or superseded by *Schempp*, and secondly, even if *Schempp* were exclusively applicable, it would not support the statute here challenged.

A. The Decisions Prior to *Schempp*

This Court has on numerous occasions considered the constitutionality of the grant of tax-raised funds or of the use of publicly-owned facilities to sectarian schools and on each occasion, without exception, it stated either expressly or impliedly that such a grant would be unconstitutional.

As we have seen, in *Quick Bear* v. *Leupp*, *supra*, the Court held that treaty and other funds held for their Indian owners by the Federal Government as trustee could constitutionally be disbursed to pay the cost of tuition for the Indians at private, religious schools which they desired to attend. The Court upheld the expenditures because the funds belonged to the Indians and not to the government; the Indians had the right to use their own money to educate their children in the schools of their own choice, even though the government could not disburse its own money to the same schools because of the First Amendment prohibition of an establishment of religion.

In *Everson* v. *Board of Education*, *supra*, this Court unanimously held that the First Amendment's ban on laws respecting an establishment of religion is applicable to the states by reason of the Fourteenth Amendment. Nevertheless, it ruled by a vote of five to four that a state (New

Jersey) could constitutionally finance bus transportation of children to parochial as well as public schools. The Court found the program to be a public safety measure to protect all children from traffic hazards and the dangers of the road. It said (330 U.S. at 16):

> We must consider the New Jersey statute in accordance with the * * * limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the state's constitutional power even though it approaches the verge of that power. (Citations omitted.) *New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.* On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of *public welfare legislation.* * * * (Emphasis supplied.)

The Court then set forth the following paragraph which has become the most authoritative, frequently reiterated and almost classic exposition of the meaning of the Establishment Clause (330 U.S. at 15-16):

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or dis-

belief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." (Emphasis supplied.)

In *McCollum* v. *Board of Education, supra,* the Court held it unconstitutional to allow the use of public school premises for sectarian teachings. The Court repeated that (333 U. S. at 210): "*No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.*" (Emphasis supplied.)

In *Zorach* v. *Clauson,* 343 U. S. 306 (1952), the Court upheld the constitutionality of a program of released time for religious education under which children would be released from public school for one hour a week to receive religious instruction in church schools, *because no expenditure of public funds or use of public buildings was involved.* The Court said (at 314): "*Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education.* * * *" (Emphasis supplied.)

In *Engel* v. *Vitale*, 370 U. S. 421 (1962), the Court, in holding unconstitutional the practice of prayer recitation in the public schools, which had been prevalent almost since the founding of the public schools, stated (at 431) that when "the power, prestige *and financial support* of government is placed behind a particular religious belief," the Establishment Clause of the First Amendment is violated. (Emphasis supplied.) The court quoted from Madison's Memorial and Remonstrance (at 436), that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

One decision remains to be discussed. In *Bradfield* v. *Roberts*, 175 U. S. 291 (1899), the Court upheld a payment of Federal funds to construct a hospital operated by a corporation formed by members of a religious order. The service performed was in the field of welfare (i.e., health) rather than education.[15] The same distinction was made in the *Everson* case, where the Court upheld the grant on the ground that its purpose was to protect the physical safety of children who traveled public streets in heavy traffic.

B. The Effect of *Schempp*

This was the state of the law before *Schempp*. It is impossible, for the following reasons, to conclude that this Court in *Schempp* intended to discard all this law and re-

15. The case is also distinguishable in that the Court pointed out that there was no evidence that the hospital was run in a sectarian manner or subject to ecclesiastical authority, and the payments covered contract payments for poor persons for whom the government was responsible, and whose care it was in effect purchasing.

place it by a weaker interpretation of the First Amendment:

1. Every member of the Court from *Everson* through *Schempp* without exception had on at least one occasion concurred in the principles set forth in the definitive interpretation of the Establishment Clause in *Everson,* quoted above.

2. The cited extract from *Schempp* was stated in a decision which went further than any previous one (with the possible exception of *Engel* v. *Vitale*) in giving a broad interpretation to the Amendment.

3. The *Schempp* opinion was written by Mr. Justice Clark who had concurred in the opinions in *McGowan* v. *Maryland,* 366 U. S. 420 (1961) and *Torcaso* v. *Watkins,* 367 U. S. 488 (1961), in both of which the classic interpretative paragraph from *Everson,* set forth above, was repeated in *haec verba* (366 U. S. at 443; 367 U. S. at 492-3).

4. It was concurred in by Mr. Justice Black, the author of that paragraph.

5. It was concurred in by the Chief Justice, the author of the *McGowan* opinion.

6. It was concurred in by Mr. Justice Douglas who, in *Engel,* expressed an interpretation of the Establishment Clause which is generally considered more strict than any expressed by any other member of the Court (370 U. S. at 437).

7. Quotations from other opinions in the *Schempp* decision indicate a clear intent to strengthen, not to weaken, the

Establishment Clause. Typical is the quotation in the Court's opinion (347 U. S. at 216) of the following extract from Mr. Justice Jackson's dissent in the *Everson* case:

> There is no answer to the proposition * * * that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could *directly or indirectly* be made public business and thereby be supported in whole or in part at taxpayers' expense. * * * This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. (Emphasis supplied.)

In conclusion on this aspect of our brief, the following from the opinion of Chief Justice Marshall in *United States* v. *Aaron Burr*, 4 Cranch 470, 482 (1807) is particularly relevant:

> * * * an opinion which is to overrule all former precedents and to establish a principle never before recognized, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established.
>
> * * *
>
> General expressions ought not to be considered as overruling settled principles without a direct declaration to that effect. * * *

It is particularly ironic that a paragraph from Mr. Justice Clark's opinion in *Schempp* should be invoked to support a claim that the interpretation of the Establishment Clause first expressed in *Everson* has been modified or watered down. As he pointed out in the opinion (374 U. S. at 216), for almost twenty years after *Everson*, efforts were made to persuade the Court to change its ruling and to hold

that the Clause forbids only governmental preference of one religion over another. This interpretation would of course greatly weaken the force of the Establishment Clause if not vitiate it entirely. "Such contentions," Mr. Justice Clark said, "in the light of the consistent interpretation in cases of this Court, seem entirely untenable and of value only as academic exercises" (*Ibid.*, p. 217). It is hard to believe that he would go out of his way to make sure that one artery from the heart of *Everson* should be sealed off to prevent the escape of its lifeblood while at the same time opening another and equally vital artery.

What, then, was the purpose of the extract from the *Schempp* opinion quoted in the trial court's decision? Here, again, the words of Chief Justice Marshall in *Burr* are particularly apposite:

> Every opinion to be correctly understood ought to be considered with a view to the case in which it was delivered. (4 Cranch at 482)

The classic paragraph and other expressions against use of tax-raised funds for sectarian educational practices or institutions were first stated in the *Everson* case, which specifically involved, or was alleged to involve, such use. They were repeated in the *McCollum* case, which involved such use in the form of the use of public school premises and of the machinery of the public school participating in the released time program. In *Engel,* this Court, with the excepton of Justice Douglas, did not consider the issue to be one of expenditure of public funds, and therefore the paragraph from *Everson-McCollum* may not have been specifically appropriate.

Nor was any expenditure involved in *Schempp*. The Court accordingly thought it fitting to state a test which would encompass governmental involvement in religion which did not involve expenditure of public funds. That test was supplemental to, not a substitute for, the oft-expressed principle first stated in *Everson* that "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

C. The Application of *Schempp*

We submit that, even if the so-called *Schempp* test were to be applied without considering anything that came before it from *Bradfield* v. *Roberts* through *Engel,* and even *Schempp* itself other than the "test," the New York textbook law would still be invalid. Under the test, a law violates the Establishment Clause if either the purpose of the primary effect is the advancement of religion. Both of these conditions apply to New York's textbook law.

We note initially that purpose and effect are inextricably bound together. It is an ancient rule of law that one is presumed to have intended the natural and foreseeable consequences of his acts. This principle was applied to the Establishment Clause in the concluding words of this Court's opinion in *McGowan* v. *Maryland, supra,* 366 U. S. at 453:

> * * * We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction

with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion.

If, as we believe we have established, public financing of the purchase of textbooks for use in parochial schools is in fact *pro tanto* a financing of their operation, and if, as was so clearly shown by Mr. Justice Jackson in his dissenting opinion in *Everson* (330 U. S. at 22-24), parochial schools are an important instrumentality of the religion taught therein, it follows that aid to the schools through the textbook law is aid to the religion. If it were not so perceived, it would be difficult to comprehend the earnest advocacy of this practice by a number of religious groups.

The Catholic parochial school system is predicated on the sections of the Canon Law quoted by Mr. Justice Jackson in *Everson*. The encyclical of Pope Pius XI *On the Christian Education of Youth* states that the "only school approved by the Church is one where * * * the Catholic religion permeates the entire atmosphere [and where] all teaching and the whole organization of the school and its teachers, syllabus and textbooks in every branch [is] by the Christian spirit." [16]

These words of Pius XI epitomize the whole Catholic philosophy of education and the educational foundation of the Catholic parochial school system. Catholic doctrine does not conceive of religion as a subject which, like history or music, can be taught more or less independently of other subjects a specified number of school hours weekly; in the Catholic school, religion is not merely

16. Redden and Ryan, *A Catholic Philosophy of Education*, 107, 118 (1942).

a branch in the curriculum, nor is it confined to mere instruction. The ultimate goal of education is the praise, reverence and service of God; and everything else in education must be subordinated and directed toward this ultimate end.[17] This leaves no place for purely secular instruction in the Catholic school; indeed, the term "secular education" is almost self-contradictory in such schools. Everything taught in the Catholic school is taught with the ultimate goal of religious education in mind—everything must be impregnated with God and religion. As stated by the Reverend Joseph H. Fichter, S. J., in an authoritative book published in 1958:

> It is a commonplace observation that in the parochial school religion permeates the whole curriculum and is not confined to a single half hour period of the day. Even arithmetic can be used as an instrument of pious thought, as in the case of the teacher who gave this problem to her class: "If it takes forty thousand priests and a hundred forty thousand sisters to care for forty million Catholics in the United States, how many more priests and sisters will be needed to convert and care for the hundred million non-Catholics in the United States?"[18]

This conclusion was reached by the Supreme Court of Oregon in *Dickman* v. *School District*, *supra*, where the Court said (232 Ore. at 243):

> The evidence establishes, and the trial judge found, that the purposes of the Catholic church in operating St. John's school and other similar schools under its supervision is to permeate the entire educational process with the precepts of the Catholic religion. The

17. *Id.* at 29.

18. Fichter, *Parochial Schools: A Sociological Study*, 86 (1958).

> study guides used by the teachers in St. John's school indicate that, to some extent at least, the use of the textbooks furnished by the district is inextricably connected with the teaching of religious concepts. These study guides were prepared by the superintendent of schools of the Archdiocese of Portland. There is no doubt that the teaching of the subject matter in this manner in a public school would be contrary to law.

The difficulty if not impossibility of separating the sacred from the secular in parochial school teaching was stressed in the dissenting opinion of Judge Van Voorhis in the court below (A. 73a-74a). The same point was made by the Supreme Court of Vermont in *Swart* v. *South Burlington Town School District*, 122 Vt. 177, 187-8, 167 A. 2d 514, 520 (1961):

> In this instance the defendant school board has elected to discharge its duty by furnishing secondary education outside the public facilities of the district. For a substantial number of its advanced students at least, the legal and public duty of the district is undertaken in religious denominational high schools that are an integral part of the Roman Catholic Church. The Church is the source of their control and the principal source of their support.
>
> This combination of factors renders the service of the Church and its ministry inseparate from its educational function. That this is a high and dedicated undertaking is not to be questioned, and deserves the respect of all creeds. Yet however worthy the object, the First Amendment commands the State shall not participate.

What is true of the Catholic parochial school is equally true of many Protestant and Jewish day schools. They

pursue the same mission and perform the same function for their faith as the parochial schools do for Catholicism.

Thus, a noted Protestant theologian said of the Protestant schools:

> Policywise, these schools fall into three general groups. The first maintains schools because it feels that the necessity for doing so is implied in its theological point of view. The second appears to maintain its schools because of the close relationship between its doctrine, its religious practices, and the total culture in which it feels its children and youth must be nurtured. The third group maintains its schools because of the conviction that an education that is not permeated with religious values of a specific Christian sort tends to promote secularism and gives the pupil the idea that religion is a thing apart from the rest of his major concerns.[19]

With respect to Jewish day schools, see Symposium, *The Jewish Day School in America: Its Theory and Practice*, 20 Jewish Education, No. 1 (1948); Kaminetsky, *The Hebrew Day School Movement*, 82 School and Society 105 (1955). As one noted authority describes the process:

> Integration is incorporated into the subject matter as well. In the expressional arts general and Jewish arts are combined and taught as one. Jewish history will encompass the history of the many people with whom the Jews came into contact. General geography will include the geography of Israel. The important events studied in the Bible, such as the Exodus from Egypt and the Revelation at Sinai, are associated with

19. Wyckoff, *The Protestant Day School*, 82 School and Society 98, 99 (1955). See also Rian, *Christianity and American Education* (1949).

> the emancipation of other peoples, and especially with the independence won by America, as well as with the doctrines of liberty and democracy that are universal in character and biblical in origin. In the domestic science laboratory nutrition and homemaking are taught along with the laws of Kashruth and Dietary observances. [20]

The sum of the matter is that Catholic parochial schools, many Protestant and Jewish day schools and similar sectarian schools of other faiths exist for one purpose and one purpose only, to preserve and advance the respective religions which created and maintain them. A law financing any part of their operations has and can only have for its purpose and primary effect governmental assistance of the religious purpose. This, we submit, the Establishment Clause of the First Amendment forbids, even under the limited interpretation advocated by the appellees and accepted by the court below.

POINT IV

The New York textbook law violates the Free Exercise Clause of the First Amendment.

We believe we have shown that the New York textbook law constitutes a form of aid to religious institutions that violates the Establishment Clause of the First Amendment. We here argue further that the law constitutes a tax for a religious purpose and that this compulsory taxation for

20. Goodside, *Religious and Secular Studies in the Day School,* 24 Jewish Education 55, 56 (1953). See also, Goodside, *Integration of Jewish and General Social Studies in the Day School,* 23 Jewish Education No. 2 (1951).

religion violates the Free Exercise Clause no less than the Establishment Clause.

Fundamental to the concept of religious freedom, as envisaged by the Framers of the First Amendment, was the belief that it was destructive of personal freedom to compel any man to pay taxes for religious purposes. Indeed, the history of the struggle for religious freedom in America is in large measure the history of the struggle against taxation for religious purposes. As early as 1644, a tanner named Briscoe in Massachusetts Bay Colony published a pamphlet against the church tax, arguing that such a method of supporting religion was immoral and contrary to justice.[21] As this Court said in *Everson* (330 U.S. at 11):

> These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment. No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist

21. Cobb, *The Rise of Religious Liberty in America*, p. 170 (1902).

any or all religions, or to interfere with the beliefs of any religious individual or group.

The Court then referred to the struggle against the tax levy for religion in Virginia, Madison's *Memorial and Remonstrance* which led to its success, and Jefferson's Statute for Establishing Religious Liberty which was a product of that success. It is significant that much of the *Memorial and Remonstrance* is framed in terms of religious liberty. Indeed, its very opening invokes the freedom of religion clause of the Virginia Declaration of Rights,[22] as does its close.[23] It is significant, too, that defeat of the tax levy led immediately to the enactment of the Statute for Establishing Religious Liberty, whose principal provision is that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever. * * *"[24]

If, as we have shown, state support of parochial schools by furnishing textbooks for use in the fulfillment of their religious mission is state support of religion, it follows that such support violates the free exercise of religion.[25] This

22. "Because we hold it for a fundamental and undeniable truth, 'that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence'." 330 U. S. at 64.

23. "Because, finally, 'the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience' is held by the same tenure with all our other rights." *Id.* at 71.

24. *Id.* at 13.

25. The interference affects not only persons who do not adhere to the faith which the schools teach and promote, but even those who do. The Virginia Statute for Establishing Religious Liberty asserts "that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern * * *." *Ibid.*

could hardly be denied if, as in the case of the Virginia Assessment Bill, a specific tax were levied to finance the new textbook law. But we submit that the fact that the funds come out of the general state and school district treasuries rather than out of a special tax does not obviate the violation of religious liberty. In the complexities of modern society and government, it is impracticable to impose specific taxes for specific purposes. Yet the underlying principle is the same; the compulsion is not eliminated simply because no specific part of the taxpayer's bill is earmarked to finance the new law.

We do not mean to suggest that a pacifist may constitutionally refuse to pay his national income tax or part of it because much of the nation's budget is devoted to financing military expenditures. His religious liberty may be infringed; Thoreau's imprisonment vividly attests to that. However, as this Court has often held, the nation's interest in its own military defense is paramount and may constitutionally justify impairment of religious freedom.[26] While Section 1 of the textbook law here challenged does mention "national defense", we suggest that this invocation should carry little weight since there is hardly any more rational or apparent adverse impact on the national defense from requiring parochial schools to continue to buy their own textbooks, than by not requiring children to salute the national flag.[27]

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26. See, e.g., *Arver* v. *United States*, 245 U. S. 366 (1918); *Hamilton* v. *Regents of the University of California*, *supra*.

27. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943).

Conclusion

For the reasons set forth herein, the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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Appendix

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
ALBANY, NEW YORK 12224

January 10, 1966

To: City, Village and District Superintendents
Supervising Principals

Subject: NEW YORK STATE TEXTBOOK LAW (Chapter 320, Laws of 1965) effective as of September 1, 1966

This letter is intended to assist public school boards of education and administrators in the administration of the New York State Textbook Law enacted in the last session of the Legislature. Contained herein is a series of explanations and suggestions, which, it is hoped, will clarify the provisions of the Law and facilitate its operation. (Copies have been sent to non-public authorities for their information.)

1. As has been noted above the Law is effective as of September 1, 1966. It provides that all boards of education and trustees (hereinafter referred to as board (s) have the power and it shall be their duty to purchase and to loan textbooks upon individual request to all children residing in the district enrolled in Grades 7-12 of a public or non-public school which complies with the compulsory education law. This mandate does not apply to children enrolled in Grades K-6.

2. The residence of the child determines the school district which is responsible for the purchase and loan of the textbooks. Requests may therefore come to a board from a number of children who are attending numerous private schools within the State. There is no requirement that a New York State school district provide textbooks for students attending non-public schools outside of the State of New York.

3. The cost of providing these textbooks is an ordinary contingent expense as referred to in Section 2023 of the Education Law.

4. The Law provides that only non-sectarian textbooks shall be provided by a Board. This places a responsibility on each board to make a determination that any textbooks which it provides are of a non-sectarian nature.

5. The request to the board for the loan of textbooks must come from the individual child. However, children may make their requests known to an official in a private school and such private school official may then provide the board with a joint request from a number of such children. The joint request should list the name and address of each child as well as the name and other specific identification of the book requested.

6. Each child to whom books are loaned will be responsible for the care and return of same. The public school officials will be responsible for maintaining adequate records to insure proper accountability for the books issued.

Appendix

To aid in accounting for textbooks issued the public school authorities should stamp each textbook loaned under the program with the name of the public school district indicated as the owner and another identification to indicate that it is related to the New York State Textbook Law to distinguish such books from others purchased under ESEA Title II or through the General Fund appropriation of the school district.

A suggested way of doing this follows:

This Book is the Property
of the
Blank C. S. District
*NYSTL #1

*The code identifies the New York State Textbook Law and the number provides a specific identification for each book, #1, #2, etc.

7. A child who is in attendance in Grades 7-12 of a private school may request and be provided any textbook which has been designated for use in any public elementary or secondary school of the state or is approved by any board. A request may also be received for a textbook which to the best of the board's knowledge, has not previously been designated or approved by any board in the state, in which case the board must decide whether or not to approve it.

8. The Law does not limit the number of textbooks a child may request; however it is reasonable to expect that the board need only provide such textbooks as are needed

in the school he attends to assist in instruction for the current year. It is expected that public and private school authorities will make it possible to use requested textbooks over a period of years rather than requesting new textbooks on an annual basis.

9. The following is suggested as a definition of a textbook for purposes of this Law: A textbook is a book which serves as a primary or basic source for implementing a state or state-approved syllabus or course of study and provided to each student in such a class. It is assumed that the public school, working in conjunction with the private schools, can decide on those books which are generally accepted as textbooks.

10. Since the effective date of this Law is September 1, 1966, it is pointed out that any state aid apportionment will be based only on payments made for textbooks on or after September 1, 1966. This does not preclude the possibility of a school district ordering textbooks any time prior to September 1, 1966, but, in order to be eligible for state aid, payment will need to be made on or after September 1, 1966. It is not possible for a public school to provide textbooks for students in non-public schools prior to September 1, 1966.

11. The Law states "such textbooks are to be loaned free to such children subject to rules and regulations as the board of education may prescribe." A board may prescribe reasonable regulations requiring students to pay for destroyed, lost, or mutilated textbooks, but it may not estab-

lish a fee or deposit for the use of such textbooks because the Law states that such textbooks are to be "loaned free."

12. All books purchased in accordance with this Law are not property of the public school district and may be loaned but not given to the children in private or public schools. It is not necessary that all books be returned to the public school at the end of the year. Each year new requests must be made for the loan of textbooks in the manner described in item 5 above.

13. The Law indicates that state aid shall be apportioned to each school district in an amount equal to the cost of the textbooks purchased and loaned, but in no case shall the aid apportioned to the district be in excess of $10 per pupil for each pupil who resides within the school district and is loaned textbooks. In order that state aid may be apportioned in accordance with this provision, school districts will need to maintain internal records showing the amount expended for textbooks provided for each individual child. *Any expenditure for a child in excess of ten dollars will not be considered for state aid purposes under this Law or under any other state aid provision of the Education Law.*

14. While the first expenditure will be made by school districts during 1966-67, the state aid payments to reimburse the districts will be made in 1967-68.

The information contained in this letter has been developed through the cooperation of appropriate members

of the Education Department, under the Chairmanship of Maurice G. Osborne. Reactions were sought and helpful advice obtained from representative administrators of public and non-public schools.

If questions should arise regarding implementation of this Law at the local level, they may be directed to Education Department officials as follows:

Regarding Textbook Selection—Gordon E. Van Hooft, Chief Bureau of Secondary Curriculum Development

Regarding Accounting and Management Aspects—A. Buell Arnold, Acting Director, Division of Education, Management Services

Regarding State Aid—John W. Polley, Director, Division of Educational Finance

Sincerely yours,

Herbert F. Johnson